FACT SHEET

July 1997

NEPA Call-In

"Designed to meet the NEPA compliance needs of GSA's realty professionals"

Environmental Site Assessments

Purpose of Environmental Site Assessments

Because hazardous waste cleanups can be very expensive and take years to complete, environmental concerns have become an important factor in property acquisition. A Phase I Environmental Site Assessment (ESA) is an important action a purchaser can take to learn about the property's past use, the environmental conditions at the site and adjoining sites, and the likely presence of hazardous substances. Armed with this knowledge, the prospective purchaser can:

- Better assess the financial risk posed by potential environmental contamination;
- Take steps to avoid full or partial liability for cleaning up the property;
- Demand that the current landowner clean up the property prior to the sale; or
- Have the cost of the property reduced commensurate with the cost of the cleanup activities.

Phase I ESAs involve records reviews, a site visit, and interviews with owners, occupants and local government officials. Phase I ESAs do not involve sampling or laboratory analysis, but must be conducted by a trained and experienced environmental professional. Because Phase I ESAs include time consuming reviews of government files and interviews, it is important to ensure adequate time is given to complete the ESA to ensure the quality of the assessment. If the Phase I ESA identifies potential hazardous substances, a Phase II ESA is usually conducted to confirm the presence or extent of contamination. Phase II ESAs involve the collection and analysis of samples.

Phase I ESAs should be conducted in accordance with "ASTM Standards on Environmental Site Assessments for Commercial Real Estate," American Society for Testing and Materials (ASTM) Standard E 1527-94 and E 1528-93.

What's Inside...

Innocent Land Owner Defense under CERCLA

If environmental contamination is discovered after the purchase of a property, the fact that a Phase I ESA was conducted helps the purchaser establish the "innocent landowner" defense under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). CERCLA was enacted to respond to situations involving past disposal of hazardous substances, and places the liability for cleanup of hazardous substances on potentially responsible parties (PRPs), including owners of the property. Therefore, if GSA acquires a contaminated site, it could be held liable for clean up of hazardous substances present at the site.

To be eligible for the innocent landowner defense under CERCLA, the property owner must establish that at the time of purchasing the property, they exercised "due diligence" to learn if hazardous substances were disposed of on the property. Environmental due diligence is a term used to describe the responsibilities of an owner or operator to conduct appropriate inquiry prior to purchasing a property. Although conducting a Phase I ESA may qualify GSA for the innocent landowner defense under CERCLA, GSA could still be held liable for clean up of environmental contamination at the site.

ESAs and NEPA

The National Environmental Policy Act (NEPA) requires Federal agencies to consider the environmental impacts of planned or future actions and decisions. Because the purpose of Phase I and Phase II ESAs is to identify and confirm the site's recognized environmental conditions resulting from past actions, they do not meet the requirements of NEPA. However, these studies do provide background information for NEPA documents. Relevant information obtained as a result of Phase I or Phase II ESAs should be reviewed by GSA experts, summarized, and coordinated with NEPA documentation. Phase I and II ESAs can be included in the appendix of NEPA documentation or included by reference.

GSA Guidance

Due Diligence Reports

GSA exercises due diligence by conducting a Phase I ESA prior to the purchase of a property to ensure all recognizable environmental conditions have been identified. For GSA purposes, recognizable environmental conditions refer to the presence or likely presence of hazardous substances covered under CERCLA, as well as petroleum products, asbestos, lead-based paint, radon, and other environmental hazards covered under other laws or industry standards. Although ASTM standards only address hazardous substances covered under CERCLA and petroleum products, GSA may request that other substances such as asbestos, lead-based paint, and radon be addressed in the Phase I ESA.

Major Data Requirements for a Phase I ESA

The environmental professional performing the Phase I ESA must provide GSA the following data as required by ASTM Standard E 1527:

1. Data on the following types of sites within the indicated minimum search distances. This information should be gained from records reviews of Federal, State and local lists. Records should be searched back to the first developed use, to include agricultural use or the placement of fill material, or until 1940, whichever is earlier.
   - Federal National Priorities List (NPL) sites – 1.0 miles
   - Federal Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) list – 0.5 miles
   - Federal Resource Conservation and Recovery Act (RCRA) Treatment, Storage, or Disposal Facility (TSDF) – 1.0 miles
   - Federal RCRA generators – local
   - Federal Emergency Response Notification System (ERNS) list – property only
   - State hazardous waste sites – 1.0 miles
   - State landfills – 0.5 miles
   - State leaking Underground Storage Tanks (USTs) – 0.5 miles
   - State registered USTs – local
2. Data obtained from a site visit. The property should be visually and physically inspected to include exteriors and interiors of any structure on the property. Note the site setting, evidence of hazardous substances in and around the property, current and past uses of the property and adjoining properties, and any avenues for the migration of hazardous substances. Particular attention should be paid to odors, standing pools, containers, corrosion, stained soils, stressed vegetation, waste piles, heating ventilation and air conditioning (HVAC) systems, equipment containing polychlorinated biphenyls (PCBs), asbestos, possible lead-based paint, bulging or subsiding areas on the property, etc.
3. Data obtained from interviews which either provides new information about the property or adjoining properties, or confirms known information. Current and prior owners and occupants, as well as local government officials should be interviewed.
4. A report describing the study and stating the study was performed in accordance with ASTM Standard E 1527. The report should include documentation of the research conducted, the credentials of the environmental professional, the presence or absence of any recognized environmental condition in connection with the property, and the environmental professional's signature. The report must clearly state, in the Findings and Conclusions section, whether or not recognized environmental conditions were found in connection with the property. If there are recognized environmental conditions associated with the site and GSA plans to acquire the property, a Phase II study should be performed.

ASTM Standards

The ASTM Standards on Environmental Site Assessments for Commercial Real Estate were written "to define good commercial and customary practice in

the United States of America for conducting an environmental site assessment of a parcel of commercial real estate with respect to the range of contaminants within the scope of [CERCLA] and petroleum products." Included in this standard are the "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," E 1527-94, and the "Standard Practice for Environmental Site Assessments: Transaction Screen Process," E 1528-93. Both standards satisfy the appropriate inquiry or due diligence requirement needed to qualify for CERCLA's innocent landowner defense.

ASTM E 1527-94, Environmental Site Assessments: Phase I Environmental Site Assessment Process

The goal of a Phase I ESA is to assess the environmental conditions of commercial real estate and identify recognizable environmental conditions. Recognized environmental conditions are defined in the standard as "the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, groundwater, or surface water of the property."

The standard outlines the steps necessary for the completion of a Phase I ESA to include the data requirements discussed above. Additionally, the standard lists information the user should provide the environmental professional:

- Environmental liens on the property discovered as a result of title records searches;
- Specialized knowledge or expertise of the user; and
- Reason for significantly lower purchase price.

Radon, asbestos-containing materials, lead-based paint, lead in drinking water, radon, and wetlands are not within the scope of the ASTM. However, the user may ask the environmental professional to consider these factors when preparing the Phase I ESA.

ASTM E 1528-93, Environmental Site Assessments: Transaction Screen Process

The Transaction Screen Process satisfies the appropriate inquiry requirement for the purposes of CERCLA's innocent landowner defense, but does not require the judgement of an environmental professional as does a Phase I ESA. The process may be performed by anyone, and consists of filling out the transaction screen questionnaire included in the standard. The questionnaire provides a guide for interviewing owners and occupants of the property, observing site conditions, and conducting limited research. Upon completion of the transaction screen process, the user should conclude whether further inquiry is needed to assess the environmental conditions at the property. If it is decided further inquiry is warranted, the user may either proceed to a Phase I ESA or research further the areas of concern.

Frequently Asked Questions about ESAs

How detailed should the ESAs be?

For each real estate transaction, the level of inquiry will be different. The term "appropriate inquiry" suggests that the level of inquiry will depend on the circumstances and the underlying facts for each parcel of real estate. Depending on the findings of the ESA, the future owner may be responsible to conduct further research or actually have sampling conducted (Phase II ESA) to determine if there is contamination. Therefore the appropriate level of inquiry may range from none at all, (in the case of single family residences), to an intrusive Phase II ESA where there is much concern about the likely possibility of contamination.

How clean is clean?

If a Phase I ESA uncovers contamination and the seller agrees to clean up the problem, the purchaser still may not receive a "clean" site. The U.S. Court of Appeals for the Third District recently rejected a purchaser's argument that an agreement for the sale of industrial property required the seller to remediate the property to an extent intended by the purchaser. This case, Sumitomo Machinery Corp. of America Inc. vs. AlliedSignal Inc., was reported in a recent edition of the Washington Business Journal.

Because the parties' agreement required the seller to clean up the contamination, AlliedSignal, the seller, had taken the lead in negotiating a cleanup plan with the New Jersey Department of Environmental Protection. Under this plan, Sumitomo, the purchaser, would be required to accept specific limitations on the future use of its property in place of more stringent cleanup levels. Sumitomo opposed this approach arguing that restrictions on the future uses of the property would decrease the property's value, and

that the purchase agreement required AlliedSignal to clean up the site to a more stringent level. The court found that the cleanup language in the sales agreement was ambiguous and AlliedSignal was only required to comply with applicable "requirements" in conducting the cleanup. Since New Jersey did not strictly "require" a more stringent level of cleanup, AlliedSignal only had to satisfy the minimum, less-costly standard acceptable to New Jersey regulators.

How current must a Phase I ESA be?

There is no commonly used commercial practice or standard for the age of an ESA among commercial banks or developers, except the guidance found in the ASTM Standard E 1527-94. The standard states that a Phase I ESA should be completed less than six months before acquiring the property. GSA guidance states: "Phase I studies are presumed valid for 180 days, although older ones may be used depending on the specific circumstances of the property."

Conditions differ from site to site and, in some cases, days or weeks can make a difference in the environmental conditions. Minimizing risk depends on the environmental professional's knowledge of the area, the property, and their professional judgement.

Phase II ESAs

Phase II ESAs further evaluate the recognized environmental conditions found as a result of a Phase I ESA. Phase II ESAs must be performed by an environmental professional, and generally include sampling of potentially contaminated areas to confirm the presence of contamination, determine its types, outline the amount of remedial actions required, and list any risks to current/future users.

A Phase II ESA may include one-or more of the following:

- ☑ Superficial soil and water samples;
- ☑ Subsurface soil borings;
- ☑ Groundwater monitoring well installation, sampling, and analysis;
- ☑ Container (drum) sampling;
- ☑ Sampling of dry wells, floor drains, and catch basins;
- ☑ Precision testing of USTs;
- ☑ Transformer/capacitor sampling and wipe tests for PCBs;
- ☑ Geophysical surveys for buried tanks and drums;
- ☑ Asbestos surveys; and
- ☑ Lead paint surveys.

References

1. "ASTM Standards on Environmental Site Assessments for Commercial Real Estate," Second Edition, E 1527-94 and E 1528-93, American Society for Testing and Materials.
2. Environmental Site Assessment, Phase I: A Basic Guide, Kathleen Hess, Lewis Publishers, 1993.
3. "Environmental Site Assessment (Phase I)," Occupational and Environmental Safety Training Division, Texas A& M University, January 1, 1992.
4. "Hazardous Waste Cleanup: Buyers Often Foot the Bill," Washington Business Journal, April 14, 1997.
5. "PBS NEPA Desk Guide," Final Draft, May 16, 1997.
6. "Scope of Work - Phase I Environmental Site Assessment," NEPA Call-In World Wide Web page.

NEPA Call-In is GSA's National Environmental Policy Act (NEPA) information clearinghouse and research service. NEPA Call-In is designed to meet the NEPA compliance needs of GSA's realty professionals.

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NEPA Call-In
Fact Sheet Amendment
Environmental Site Assessments

The American Society for Testing and Materials (ASTM) has revised its 1994 standards, which were used as reference material for the NEPA Call-In, Environmental Site Assessment fact sheet. As a result, NEPA Call-In has compared the old and new standards to determine what revisions were made.

In our review of the revised ASTM 1997 Phase I ESA standards, we found only two minor revisions. The first revision is the addition of a minimum search distance from the target property for Federal CORRACTS TSD facilities. CORRACTS TSD facilities are those on the Environmental Protection Agency's (EPA's) list of treatment, storage, or disposal facilities subject to corrective action under the Resource Conservation and Recovery Act (RCRA).

The second revision to the 1997 Phase I standards is the addition of Section 1.1.6, "Documentation," under Part 1, "Scope." This new section states, "The scope of this practice includes research and reporting requirements that support the user's ability to qualify for the innocent landowner defense. As such, sufficient documentation of all sources, records, and resources utilized in conducting the inquiry required by this practice must be provided in the written report." Additionally, Section 7.1.8, "Documentation of sources checked," states, "The report shall document each source that was used, even if a source revealed no findings. Sources shall be sufficiently documented, including name, date request for information was filled, date information provided was last updated by source, date information was last updated by original source (if provided other than by original source) so as to facilitate reconstruction of the research at a later date." Although brief, this new section is important because by adding it, ASTM is stressing the importance of documenting all actions taken and sources researched during the Phase I study. A well-documented Phase I study where no contamination concerns were uncovered will better support the innocent landowner defense in a court of law should contamination be discovered at a later date.